



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC JUDICIAL REVIEW NO. 3 OF 2015

FORT PROPERTIES LIMITED.....APPLICANT

=VERSUS=

1. DIRECTOR OF PHYSICAL PLANNING COUNTY GOVERNMENT OF KILIFI

2. COUNTY SECRETARY COUNTY GOVERNMENT OF KILIFI

3. NATIONAL CONSTRUCTION AUTHORITY.....RESPONDENTS

J U D G M E N T

Introduction

1. The Notice of Motion before me is the one dated 28th April, 2015 in which the Ex parte Applicant is seeking for the following Judicial Review orders:-

(i) **An order of prohibition prohibiting the Respondents, their officers, agents, servants and any other person under their authority from receiving, considering application for development and or granting any development permission or occupation certificate on property known as Plot No. 130 Malindi comprising of CR 19971 to any person other than the Ex parte Applicant or under the Ex parte Applicant's authority.**

(ii) **An order of MANDAMUS compelling the Respondents, their agents, servants or any other person under their authority to issue an enforcement or closure notice directing any occupier, developer or any other person other than the Ex parte Applicant to demolish, remove and or close all unauthorised structures on property known as Plot NO. 130 Malindi comprised in CR 19971 registered in the name of the Ex parte Applicant herein FORT PROPERTIES LIMITED**

(iii) **The costs of this application be provided for.**

2. The Motion is premised on the Applicant's statutory statement in which it has stated that it is the registered proprietor of the suit property which it intends to develop; that the existence of dangerous buildings put up by squatters and licencees is in total disregard of the safety of the Applicant's servants and that the Respondents have failed to undertake their statutory mandate of regulating and managing building developments in their jurisdiction.

3. According to the Ex-parte Applicant, the Respondents have in breach of their statutory mandate received and considered applications for developments and granted development permissions to structures that do not meet the requirements under the Building Code and Planning Regulations.
4. It is the Applicant's case that the squatters passing off as developers are cartels in the construction industry who have allowed tenants to occupy buildings that are incomplete.
5. One of the Interested Parties, one Peter Mungai, deponed that he is one of the thousands of other people living on the suit property on which they have put up structures; that the Application is not specific of the buildings it alleges were put up without approved plans and that the nature of the buildings on the suit property are varied.
6. According to the Interested Parties, by dint of HCCC No. 171 of 2011, the Plaintiff sought, among other orders an injunctive order with the ultimate purpose of evicting them; that they have filed a Defence; that the Application has been filed in disregard of the orders of the court to maintain the status quo and that the orders of status quo were entered into by the consent of the parties.
7. In his Affidavit, the 1st Respondent's Chief Officer deponed that no development has been granted by his office in respect of any development on the suit property; that his office is not aware of the unauthorised developments or the actual developments and that any event demolition is a discretionary power under section 38 of the Physical Planning Act.
8. The 2nd Respondent's County Secretary on the other hand deponed that the Motion is totally without merit; that the 2nd Respondent is not aware of the existence of the squatters on the suit property and that if there is any faulty building posing risk and danger, then the Applicant should follow up with the relevant authorities.
9. In his Further Affidavit, the Applicant's director deponed that the other suits that have been filed in this matter concern ownership of land while the issue herein is with regard to dangerous developments which have not been authorized by the Respondents.
10. The advocates for the Ex-parte Applicant, the 1st and 2nd Respondents and the Interested Parties filed their respect submissions and authorities which I have considered.
11. The Applicant is aggrieved by the decision allegedly made by the Respondents to permit the construction of structures on the suit property.
12. According to the Grounds in support of the Motion, the Respondents have allowed persons passing off as squatters to construct illegal structures on the suit property without its (Applicant's) consent notwithstanding the fact that the Applicant is the registered owner of plot number 130 Malindi.
13. In any event, and as correctly submitted by the 1st and 2nd Respondent's advocate, it is trite law that when a decision is made by a body exercising a public duty, the decision of such a body stands until such a time when it is reviewed, revoked or quashed.
14. The current Application is not seeking the quashing of any decision. Instead, the Applicant is seeking for an order of Mandamus to compel the Respondent to make a different decision.
15. An order of Mandamus only compels a person or a body to perform a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same **(See Kenya National Examination Council Vs R Ex-parte Geoffrey Gathenji Njoroge & 9 Others [1997] e KLR)**. An order of Mandamus cannot therefore quash a decision which has already been made.
16. The Applicant has further alleged that, by receiving, considering and granting development permission or occupation certificates for structures on the suit land, the Respondents have failed to undertake their statutory mandate of regulating and managing building developments in their jurisdiction.
17. If the Applicant's case is that the Respondents' actions are illegal, or unfair or unreasonable or ultra vires, then the appropriate Judicial Review orders that it should have sought is an order of certiorari and not prohibition or mandamus.
18. It is only an order of certiorari which can quash a decision that has already been made on the ground that the decision is illegal, unfair, unreasonable or ultra vires the statute.
19. The Applicant is also seeking for an order of prohibition to prohibit the Respondent from receiving, considering applications and granting any development provision on the suit property.
20. This court cannot issue such a blanket order considering that the issue of ownership, where both the Applicant and the Interested Party is still pending in this court.
21. Indeed, this court is seized of two matters being ELC Civil Case Nos 171 of 2011 and 72 of 2012

- (OS) in which the parties herein are laying a claim on the suit property.
22. In the two suits, the parties agreed that the status quo should be maintained pending the hearing of the suits.
23. What the order of status quo meant was that the Interested Parties would continue to stay in their houses until the determination of the suits.
24. This court, sitting as a Judicial Review Court, is therefore not the right forum to make a determination on who is the legal owner of plot number 130 Malindi.
25. Indeed, what the Applicant is asking is for a determination of HCCC No.1 71 of 2011 and 72 of 2012 (OS) through these proceedings. That is a legal absurdity that this court cannot allow.
26. For those reasons, I find the Notice of Motion dated 28th April, 2015 to be unmeritorious and I dismiss it with costs.

Dated and delivered in Malindi this **11th** day of **March**, 2016.

O. A. Angote

Judge